(1) Supreme Court, U.S.
FILED

No. 01 549 SEP 27 2001

THE CLERK

In the

Supreme Court of the United States

In the Matter of the Marriage of:

Barbara A. Richter,

Respondent,

v.

Kevin J. Richter,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JOHN REMINGTON GRAHAM
*Counsel of Record**
180 Haut de Paroisse
St-Agapit (LOTB)
Quebec GOS 1ZO Canada
(418) 888-5049

Counsel for the Petitioner

*Admitted to the Bar of the Supreme Court of the United States, August 5, 1971

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

29 pp

QUESTIONS PRESENTED FOR REVIEW

Is marriage a contract within the meaning of the prohibition of laws impairing the obligation of contracts in Article I, Section 10 of the United States Constitution, as suggested by Chief Justice John Marshall in *Dartmouth College v. Woodward*, 4 Wheaton 518 at 629 (U. S. 1819)? Or is the correct view that marriage is not a contract within the meaning of such prohibition, as suggested by Justice Stephen Field in *Maynard v. Hill*, 125 U. S. 190 at 210 (1888)?

If marriage is a contract within the meaning of such constitutional prohibition of laws impairing the obligation of contracts, must a state law allowing divorce or dissolution of marriage for irretrievable breakdown in the marriage relationship [in this case Section 518.10(g) and related provisions in Minnesota Statutes] be construed strictly, thus limiting divorce or dissolution of marriage to real, uncontrived, and objective impossiblity, the same as is required in the general jurisprudence of the United States for avoidance of any other contract on account of impossibility?

And, if a marriage is a contract within the meaning of such constitutional prohibition of laws impairing the obligation of contracts, does an individual contesting a suit for divorce or dissolution of his or her marriage on statutory grounds of irretrievable breakdown of the marriage relationship, have a right, under the guarantee of due process of laws in Amendment XIV of the United States Constitution, to a hearing with the assistance of counsel on whether such grounds actually exist?

TABLE OF CONTENTS

Question Presented for Review i

Table of Authorities iii

Jurisdiction 1

Constitutional Provisions 2

Statement of the Case 2

Reasons Why the Writ should be Granted 4

Conclusion 13

Appendix A, Order of the Minnesota Supreme Court, July 24, 2001 ..... A-1

Appendix B, Opinion of the Minnesota Court of Appeals, May 1, 2001 ..... A-2

TABLE OF AUTHORITIES

Federal Cases:

Cohens v. Virginia, 6 Wheaton 264 (U. S. 1821) 10

Dartmouth College v. Woodward, 4 Wheaton 518 (U. S. 1819) ..... i, 6, 7, 9, 11

Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 (1934) 6

Maynard v. Hill, 125 U. S. 190 at 210 (1888) ..... i, 9, 10, 11

N. L. R. B. v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937) 8

North German Loyd v. Guaranty Trust Co., 224 U. S. 12 (1917) 9

Texas Co. v. Hogarth Shipping Co., 256 U. S. 619 (1921) 9

State Cases:

Baker v. Nelson, 191 N. W. 2d 186 (Minn. 1971) 5

Cut Rate Supermarkets v. Kingpin Foods, 98 N. W. 2d 257 (Minn. 1959) 7

Desnoyer v. Jordan, 7 N. W. 140 (Minn. 1880) 5

Johnson v. Johnson, 307 N. W. 2d 786 (Nebr. 1981) 8

Marriage of Frank, 542 P. 2d 845 (Colo. 1975) 11

Marriage of Walton, 104 Cal. Rptr. 472 (Cal. App. 1972) ... 11

Power v. Siat, 70 N. W. 2d 865 (Minn. 1969) 9

State v. Pulle, 12 Minn. 164 at 170-171 (1866) 5

Federal Statutes and Rules:

28 United States Code, Section 1257 1

Rules of the United States Supreme Court, Rule 13 1

Provisions of the United States Constitution:

Article I, Section 10 ..... passim

Amendment XIV, Section 1 ..... i, 2

Statutes and Constitution of Minnesota:

Revised Laws of Minnesota 1905, Section 3552 5

Revised Laws of Minnesota 1905, Section 3574 5

Minnesota Constitution of 1974, Article I, Section 11 3

Minnesota Laws of 1974, Chapter 107 7

Minnesota Statutes, Section 517.01 ..... 3, 5

Minnesota Statutes, Section 518.10(g) ..... i, 2, 8

English Authorities

Sir William Blackstone, *Commentaries on the Laws of England*, Christian Ed. 1765 5

Graves v. Legg, 156 Eng. Rep. 304 (Exch. 1854) 7

Comes now your petitioner, and he shows this honorable Court the following particulars in support of his petition for writ of certiorari to the Minnesota Court of Appeals, to wit:

JURISDICTION

Your petitioner seeks reversal of a judgment of the Minnesota Court of Appeals taking the shape of an opinion filed on May 1, 2001, and reported in 625 N.W.2d 490, the same reproduced in Appendix B hereof. A petition for discretionary review by the Minnesota Supreme Court was sought, and the petition was denied on July 24, 2001, by order whereof a copy has been reproduced in Appendix A hereof.

Jurisdiction to review this cause on writ of certiorari is premised on 28 United States Code, Section 1257, insofar as it permits this Court to review the final judgment of the highest court of a State in which a decision could be had, where a title, right, privilege, or immunity is specially set up or claimed under the United States Constitution, in this case the prohibition of laws impairing the obligation of contracts in Article I, Section 10, and the guarantee of due process of law in Amendment XIV.

Jurisdiction to review this cause on writ of certiorari is also premised on Rule 13 of the Rules of the United States Supreme Court, insofar as it permits such review within 90 days of the order of the court of last resort in the State denying discretionary review of the final judgment of the highest court of the State in which the decision could be had, in this case the order of the Minnesota Supreme Court, filed July 24, 2001, denying discretionary review of the final judgment of the Minnesota Court of Appeals, filed on May 1, 2001.

CONSTITUTIONAL PROVISIONS

Two provisions of the United States Constitution are here involved, to wit: -- Article I, Section 10, insofar as it provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." And Amendment XIV, Section 1, insofar as it provides, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." The latter provision is raised for purposes of this petition, and then as a matter of course, only if your petitioner is right in what he maintains with respect to the former provision.

STATEMENT OF THE CASE

While the full record of this case involves many interesting details, and the particulars may receive more focused attention later, the basic facts, the procedural posture of the case, and an ample discussion of the applicable law as it is thought to prevail in the State of Minnesota, have been stated in the carefully crafted opinion of Judge Gordon Shumaker in behalf of the Minnesota Court of Appeals, filed May 1, 2001 and set forth in Appendix B hereof. Your petitioner disagrees with Judge Shumaker's legal reasoning and conclusions, but stipulates that the facts and record are stated with sufficient accuracy in Judge Shumaker's opinion to suit the purposes of his prayer for writ of certiorari.

Your petitioner was sued in Norman County, Minnesota, by his wife represented by counsel. She sought a divorce -- now called "dissolution of marriage" in Minnesota -- on the claim of "irretrievable breakdown of the marriage relationship" as allowed by Section 518.10(g) and related provisions in Minnesota Statutes. Your petitioner denied grounds for dissolution, and contested proceedings against him on that basis among others.

The trial judge set the "final hearing" of all issues on May 8, 2000. Your petitioner did not at the time have counsel, and so prepared a motion pro se, noticed for hearing on May 8, 2000, seeking dismissal of the suit on the basis that marriage is a contract, and that no grounds existed to rescind or avoid such contract. Your petitioner maintained on good authority, including Section 517.01 of Minnesota Statutes, that marriage is a civil contract between a man and a woman. He also cited the prohibition of laws impairing the obligation of contracts as set forth in Article I, Section 11 of the Minnesota Constitution, and in Article I, Section 10 of the United States Constitution.

The trial judge dismissed your petitioner's motion sua sponte by order of April 26, 2001. From the face of the order, it is evident that the trial judge was annoyed by the defense of your petitioner, based on the view that marriage is a contract. In the said order of April 26, 2001, the trial judge stated that "the hearing scheduled for May 8, 2000, is canceled." Your petitioner read the order as canceling the hearing on May 8, 2001 for all purposes, since the order did not specify a limitation of purpose. He was then informed on May 5, 2001, that the trial judge meant to cancel only the hearing on his motion based on the contract theory of marriage, but the hearing would still be held for all other issues. On the same day, a member of the Minnesota Bar notified the trial judge that he had been contacted by your petitioner, that he thought your petitioner's view of marriage as a contract was sound, and that he would represent your petitioner if a continuance of 60 days were allowed to prepare for trial.

On May 8, 2000, your petitioner appeared before the trial judge and asked for a continuance so he might engage counsel. The trial judge denied the request. Your petitioner left the courtroom. The dissolution was granted. Your petitioner made post-trial motions which were denied, and your petitioner appealed, this time with the assistance of counsel.

The Minnesota Court of Appeals affirmed on May 1, 2001, as appears in Appendix B hereof. It is clear from Judge Shumaker's opinion that the Minnesota Court of Appeals thought your petitioner had properly raised the prohibition of laws impairing the obligation of contracts in Article I, Section 10 of the United States Constitution in defense of his interests. The defense raised was not that the statute allowing dissolution of marriage on grounds of irretrievable breakdown is unconstitutional on its face. The defense was that the statute should be strictly construed in conformity with constitutional principle, that the statute was unconstitutionally applied in the particular circumstances of this case, and that he was at least entitled to a hearing on the merits. The appellate court overruled his defense squarely on grounds that marriage is not a contract within the meaning of the prohibition of laws impairing the obligation of contracts in Article I, Section 10 of the United States Constitution. Plainly enough, if the Minnesota Court of Appeals had held that marriage is a contract within the meaning of the contract clause of Article I, Section 10 of the United States Constitution, it would have reversed and remanded for a hearing on whether grounds existed for dissolution of his marriage.

Your petitioner sought discretionary intervention by the Minnesota Supreme Court, which denied further review on July 24, 2001, as appears in Appendix A hereof.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case raises a question of profound importance in the practice of matrimonial law throughout the United States. The experience in Minnesota is typical of the experience in most other States, and so the nature of the main question, which your petitioner asks this Court to address, will be explained in reference to the legal history of your petitioner's State.

Minnesota, like almost every other State in the Union, received the common law of England, as appears in *State v. Pulle*, 12 Minn. 164 at 170-171 (1866). And part of the common law as received was described by Sir William Blackstone, who wrote of "marriage, which includes the reciprocal rights and duties of husband and wife." He continued, "Our law considers marriage in no other light than as a civil contract," then added, "And, taking [marriage] in this civil light, the law treats it as it does all other contracts, allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract in the proper forms and solemnities required by law." -- *Commentaries on the Laws of England*, Christian Ed., Bk. I, p. 433.

And lest any doubt be entertained on whether these principles of the common law have been received in Minnesota, it was declared in Revised Laws of Minnesota 1905, Section 3552, and now provides in Section 517.0l of Minnesota Statutes that "marriage, so far as its validity is concerned, is a civil contract between a man and a woman., to which consent of the parties, capable of contracting, is essential." See also *Baker v. Nelson*, 191 N. W. 2d 186 (Minn. 1971), in which it was held that, in light of legal tradition and other considerations, it is not unconstitutional to define marriage as a union between a man and a woman; and *Desnoyer v. Jordan*, 7 N. W. 140 (Minn. 1880), in which it was held that an antenuptual agreement is a contract, the obligations of which may not constitutionally be impaired by law.

It appears in Revised Laws of Minnesota 1905, Section 3574, and the amendments thereof, that grounds for divorce in your petitioner's State have traditionally been limited to adultery, cruel and inhuman treatment, impotency, and such like. Statutes of this kind prevailed throughout the Union

over a greater part of the 20th century. Divorce was said to be based on "fault."

When in *Dartmouth College v. Woodward*, 4 Wheaton 518 (U. S. 1819), Chief Justice John Marshal labored to establish that the charter of a corporation granted by King George III was a contract within the meaning of the contract clause in Article I, Section 10 of the United States Constitution, he was confronted with the argument that such a broad notion of contract would lead to the conclusion that marriage is no less a contract, and thus protected by the constitutional prohibition of laws interfering with the obligation of contracts. And certainly this argument was founded upon an unassailable premise. For, as Blackstone said, marriage has always been understood as a civil contract between a man and a woman.

If a man and woman marry, the husband has inchoate rights to the estate of his wife, the wife has inchoate rights to the estate of her husband, and the law of a State abolishing those rights after due celebration and consummation would be null and void under the contract clause in Article I, Section 10 of the United States Constitution. Nothing advanced in *Home Bldg. & Loan Ass'n v. Blaidell,* 290 U. S. 398 (1934), could possibly save a law abrogating such mutual rights of husband and wife arising from their marriage contract.

But the more ominous yet erroneous suggestion of the argument made before Chief Justice Marshall was that any and all divorce allowed by law would necessarily be unconstitutional. Chief Justice Marshall answered in words quoted by the Minnesota Court of Appeals:

> "It [i. e., the contract clause in Article I, Section 10 of the United States Constitution] never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. *Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties*

because it has been broken by the other. When a state legislature shall pass an act annulling all marriages, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional." -- *Dartmouth College v. Woodward*, 4 Wheaton at 629 [Emphasis added by the undersigned].

In these words, Chief Justice Marshall did not deny, but affirmed that marriage is after all a contract entitled to constitutional protection. But he conceded that a "marriage contract," like any other contract, may be avoided or set aside for material breach. It is part of the general jurisprudence of Great Britain and the United States that material breach justifies termination of a contract, nor has it ever been supposed that avoidance or rescission of a contract on such grounds impairs the obligation of such contract, contrary to the prohibition in Article I, Section 10 of the United States Constitution. The principle is much older, but the classic case, with which countless judicial decisions concur in every State of the Union, is *Graves v. Legg*, 156 Eng. Rep. 304 (Exch. 1854), in which it was held that a material breach defeating the purpose of the contract may at his or her option discharge the wronged party from further obligation. Cf. *Cut Rate Supermarket v. Kingpin Foods*, 98 N. W. 2d 257 (Minn. 1959). Because the marriage contract has always assumed customary obligations and mutual expectations of fidelity, protection, succor, sexual union, and care of children, a statute allowing divorce on account of adultery, cruel and inhuman treatment, impotency, etc., is really nothing but a law allowing equitable intervention to rescind such contract on account of material breach.

In Chapter 107 of Minnesota Laws of 1974, following a trend which has since become well nigh universal in the United States, the legislature of your petitioner's State

abolished the traditional grounds for divorce, and in lieu thereof substituted one general formula, which is now codified in Sections 518.10(g) and related provisions of Minnesota Statutes. Dissolution of marriage may now be granted whenever it can be shown that there has been an "irretrievable breakdown in the marriage relationship." This innovation was intended to avoid undue acrimony in our family courts, and to make termination of marriage a more dignified and tolerable experience. The reform is often called "no fault" divorce, but it really means that dissolution of marriage is no longer granted on account of material breach of the marriage contract. The question now is not whether Susan was an adultress or Michael was cruel and inhuman, but whether the marriage of Susan and Michael is broken beyond repair or remedy. See, e. g, *Johnson v. Johnson,* 307 N. W. 2d 783 (Nebr. 1981).

Your petitioner finds nothing objectionable in this change, so long as the statutory language is construed in conformity with the venerable rule stated by this Court in *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 at 30 (1937), "that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

Seen in this light, the statutory phrase "irretrievable breakdown of the marriage relationship" must be given a rigorous interpretation so as to mean actual impossibility in continuing the marriage relationship, an impossibility of performance which the party seeking dissolution cannot repair after a serious and honest effort carried as far as reason and prudence will allow, an impossibility real and uncontrived, the kind of impossibility which meets the standards of our general jurisprudence for avoidance of other contracts.

Your petitioner proposes that Section 518.l0(g) and related provisions of Minnesota Statutes, and all similar laws

in other States, demand the kind of impossibility illustrated by such classic cases as *North German Lloyd v. Guaranty Trust Co.*, 224 U. S. 12 (1917), and *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619 (1921). Cf. *Power v. Siat,* 70 N. W. 2d 344 (Minn. 1955). If the statutory phrase "irretrievable breakdown of the marriage relationship" means such objective impossibility, and neither divorce on demand nor its practical equivalent, and if such irretrievable breakdown must, therefore, be considered in earnest by a family court upon a proper hearing as elementary due process under the 14th Amendment whenever the issue is contested and a demand for hearing is made in good faith, then the contract clause in Article I, Section 10 of the United States Constitution is not violated. But your petitioner insists that perfunctory and insensitive application of such laws, as occurs all too often in our contemporary divorce mills and as occurred in this case, is prohibited by the contract clause in Article I, Section 10 of the United States Constitution. And the undersigned believes that Chief Justice Marshall would have agreed with this assessment.

Your petitioner, of course, acknowledges the contrary language of Justice Stephen Field in *Maynard v. Hill*, 125 U. S. 190 at 210 (1888). It is precisely because there is a conflict between what Chief Justice Marshall said and what Justice Field said that this Court should get involved here and clarify this important point of fundamental law. It is not easy to raise such a point on a record so that it may be reviewed properly by this Court, and this case offers a rare opportunity for such review. Your petitioner urges this Court not to waste this opportunity to resolve this point of fundamental law in the public interest.

The Minnesota Court of Appeals observed that the remarks of Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheaton at 629, were dicta and so not binding authority with respect to the contract clause in Article I, Section 10 of the United States Constitution. That

observation seems fair enough. See the comments of Chief Justice Marshall on the definition and value of dicta in *Cohens v. Virginia*, 6 Wheaton 264 at 399-400 (1821).

But the Minnesota Court of Appeals was certainly in error in saying that the observations of Justice Field in *Maynard v. Hill,* 125 U. S. at 210, were holding and therefore binding authority with respect to the contract clause of Article I, Section 10 of the United States Constitution.

The case before Justice Field involved an act passed by the legislature of the Oregon Territory which dissolved a marriage, and title to a parcel of land depended on such act. The contract clause of Article I, Section 10 of the United States Constitution was not involved in the case before Justice Field, because that clause is a limitation upon the legislatures of the several States, whereas the Oregon Territory was not a State, but was created by an organic act of Congress under the second clause of Article IV, Section 3 of the United States Constitution. The supreme court of the Oregon Territory evidently interpreted the organic act of Congress as implicitly prohibiting laws impairing the obligation of contracts, even though no such provision was therein actually expressed as in the Northwest Ordinance of 1787, reenacted in 1789 (1 U. S. Statutes at Large at 52). Justice Field said, as the Minnesota Court of Appeals noted,

> "*Assuming* that the prohibition of the Federal Constitution against the impairment of contracts by state legislation applies equally, *as would seem to be* the opinion of the Supreme Court of the Territory, to legislation by territorial Legislatures, we are clear that marriage is not a contract within the meaning of the prohibition." -- *Maynard v. Hill,* 125 U. S. at 210 [Emphasis added by the undersigned].

In this sentence, Justice Field made clear that he was *not* interpreting the contract clause in Article I, Section 10 of the

United States Constitution. Instead, he interpreted a prohibition which, for all he knew, may not even have been part of the organic act of Congress establishing the Oregon Territory. That disposes of the claim that the observation of Justice Field is binding authority on the meaning of the contract clause in Article I, Section 10 of the United States Constitution. His remark was hypothetical and speculative.

And Justice Field was wrong, because he was supposedly "clear that marriage was not a contract within the meaning of the prohibition" from his *misreading* of what Chief Justice Marshall had said in *Dartmouth College v. Woodward,* 4 Wheaton at 629. For Chief Justice Marshall the conceded that marriage *is* a contract within the meaning of the prohibition.

Aside from the Minnesota Court of Appeals, other appellate courts have been misled by the remarks of Justice Field in *Maynard v. Hill*, 125 U. S. at 210. See in particular *Marriage of Walton,* 104 Cal. Rptr. 472 (Cal. App. 1972), and *Marriage of Frank*, 542 P. 2d 845 (Colo. 1975). *Walton* and *Frank* were not very satisfactory cases, because there the question raised was whether statutes allowing dissolution of marriage for irretrievable breakdown were prima facie unconstitutional, which, as your petitioner concedes, was certainly going too far. *Walton* and *Frank* were also unsatisfactory for the additional reason that the court in neither case was aware of the critical observations of Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheaton at 629, and of the undeniable legal tradition, described by Blackstone, which Chief Justice Marshall had acknowledged.

The decision of the Minnesota Court of Appeals in this case, however, is ripe for review because the right question is asked, viz., whether a statute allowing divorce should be *strictly construed* in keeping with the contract clause of Article I, Section 10 of the United States Constitution to permit dissolution of marriage only for reasons sufficient to

permit avoidance or rescission of a contract. And the decision of the Minnesota Court of Appeals in this case is particularly appropriate for review, especially because the conflict between Chief Justice Marshall and Justice Field is plainly noted and addressed. Judge Shumaker wrote an opinion in good professional form, which serves to facilitate review by this Court.

What is now needed in American jurisprudence is a careful look by this Court at the question of whether marriage is or is not a contract within the meaning of the contract clause of Article I, Section 10 of the United States Constitution.

If marriage is such a contract, as your petitioner believes, and if this Court acknowledges it, then the practice of matrimonial law throughout the country will be changed for the better, because then, in States with statutes allowing dissolution of marriage for irretrievable breakdown of the marital relationship, lawyers and clients will be obliged to explore whether repair of marital breakdown is a genuine possibility before commencing predatory litigation. That will strongly tend to prevent "sneak attack" and "race to the courthouse" tactics. It will induce matrimonial lawyers to work in the direction of reconciliation, or at least divorce with dignity, for which they will be entitled to charge fees and earn them to more constructive purpose. It will oblige matrimonial lawyers to jettison destructive practices which have given them a bad name. It will save, by no means all, perhaps not most, but at least many marriages, because it will require estranged spouses to attempt reconciliation as mature adults. That in turn will help keep intact families which otherwise might break up. Our children and our civilization will benefit.

CONCLUSION

WHEREFORE, your petitioner respectfully prays for a writ of certiorari to the Minnesota Court of Appeals.

Dated: September 26, 2001

Respectfully submitted,

JOHN REMINGTON GRAHAM
*Counsel of Record**
180 Haut de la Paroisse
St-Agapit, Quebec GOS 1ZO Canada
TEL-FAX: 418-888-5049

Counsel for the Petitioner
*Admitted to the Bar of the Supreme Court of the United States, August 5, 1971

STATE OF MINNESOTA

IN SUPREME COURT

C4-00-1656

In Re the Marriage of:

Barbara A. Richter,

Respondent,

vs.

Kevin J. Richter,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Kevin T. Richter for further review be, and the same is, denied.

Dated: July 24, 2001

BY THE COURT:

/s/
Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
C4-00-1656

In Re the Marriage of:

Barbara A. Richter, petitioner,
Respondent,

vs.

Kevin J. Richter,
Appellant.

Filed May 1, 2001
Affirmed
Shumaker, Judge

Norman County District Court
File No. F499187

Michael L. Gjesdahl, Gjesdahl & Deitz, PLLP, 107 North 8th Street, Fargo, ND 58102 (for respondent)

John Remington Graham, 180 Haut de la Paroisse, St-Agapit (LOTB), Quebec GOS1Z0 Canada (for appellant)

Considered and decided by Peterson, Presiding Judge, Shumaker, Judge, and Poritsky, Judge.*

---

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

Marriage is not a contract for purposes of the Contract Clauses of United States and Minnesota Constitutions.

OPINION

GORDON W. SHUMAKER, Judge.

The district court set a May 8, 2000 "final hearing" to dissolve the marriage of appellant-husband Kevin Richter and respondent-wife Barbara Richter. Husband moved to dismiss the proceeding, alleging, among other things, that marriage was a contract and that the dissolution statutes violated the provisions in the United States and Minnesota Constitutions prohibiting statutes that interfere with the right to contract. Husband's motion stated it would be heard on May 8. The district court dismissed husband's motion, stating the hearing set for May 8 was cancelled. On May 8, after denying husband's request for a continuance, husband withdrew from the courtroom, and the district court took testimony from wife. The district court later dissolved the marriage and denied husband's posttrial motion. Husband appeals. Because the district court correctly rejected husband's challenge to the dissolution and did not abuse its discretion in denying a continuance, we affirm.

FACTS

The parties married in 1983 and wife petitioned to dissolve the marriage in September 1999. Husband opposed wife's attempts to dissolve the marriage. In early April 2000, the district court set a "final hearing" for May 8 and granted the motion of husband's attorney to withdraw. On April 25, husband, pro se, moved to dismiss the proceeding, alleging, among other things, that (a) there was no irretrievable

breakdown of the marriage; (b) marriage is a contract; and (c) the statutes allowing dissolution of a marriage infringed on the constitutional right to contract. Husband's motion stated it would be heard on May 8.

On April 26, the district court, sua sponte, dismissed husband's motion in an order stating that the hearing set for May 8 was cancelled. Two days later, wife's attorney sent husband a letter stating that the May 8 hearing that had been canceled was the hearing on husband's motion, not the hearing for the dissolution. Husband disagreed. On May 3, husband sent a letter to the district court administrator asking for notice of when the case would be rescheduled and asking for a continuance. On Friday May 5, the district court, trying to remove any confusion, stated the dissolution hearing would occur on May 8. Also on May 5, the district court administrator received a fax and a phone call from an attorney stating he was negotiating terms for representing husband but had not yet been retained and that he would need a 60-day continuance of the proceeding.

At the May 8 hearing, husband (still pro se) asked for a continuance, the district court denied the request, husband withdrew from the courtroom, and the district court took testimony from wife. An amended judgment dissolving the parties' marriage was entered an May 26 and husband, after the denial of his posttrial motion, appeals.

ISSUES

1. Does Minnesota's dissolution statute allow "divorce on demand"?

2. Is marriage a contract for purposes of the Contract Clauses of the United States and Minnesota Constitutions?

3. Did the district court abuse its discretion by denying husband's request for continuance?

ANALYSIS

Minnesota allows marriages to be dissolved if there has been an "irretrievable breakdown of the marriage relationship." Minn. Stat. § 518.06, subd. 1 (2000); *see* Minn. Stat. § 518.10(g) (2000) (requiring dissolution petition to allege "irretrievable breakdown of the marriage relationship"). While husband denies challenging the constitutionality of the Minnesota's dissolution statute, he argues that to be constitutional, the statute cannot be construed to allow "divorce on demand" because that would interfere with his right to contract. *See* U.S. Coast. Art. I, § 10 (prohibiting laws "impairing the obligation of contracts"); Minn. Const. Art. I, § 11 (same). To challenge the dissolution of his marriage on these grounds is to functionally argue that the dissolution statute was applied to grant wife a "divorce on demand," thereby unconstitutionally depriving husband of his right to contract. Such an argument assumes that the Minnesota dissolution statutes allow "divorce on demand" and that marriage is a contract. Both assumptions are incorrect.

I.

In Minnesota, if there is a dispute about whether a marriage is irretrievably broken, "the court shall consider all relevant factors" and find whether the marriage is irretrievably broken. Minn. Stat. § 518.13, subd. 2 (2000). "Irretrievable breakdown" occurs when "there is no reasonable prospect of reconciliation." *Id.* To find irretrievable breakdown of a marriage in a case where the existence of such a breakdown is contested,

> [t]he finding [of irretrievable breakdown] must be supported by evidence that (i) the parties have lived separate and apart for a period of not less than 180

> days immediately preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties.

Id. Here, the parties had been separated, but not for 180 days, before wife petitioned to dissolve the marriage. The district court, however, believed wife's testimony about the state of the parties' marriage and found an irretrievable breakdown of the marriage. A party's testimony is a sufficient basis for a finding of irretrievable breakdown of a marriage, *See Hagerty v. Hagerty,* 281 N.W.2d 386, 388 (Minn. 1979) (stating irretrievable breakdown "can also be shown by evidence of only one party's belief that it is the existing state, particularly where the parties have been living apart"); *Hollander v. Hollander,* 359 N.W.2d 55, 56-57 (Minn. App. 1984) (affirming finding of irretrievable breakdown noting that, among other things, it was supported by wife's testimony). A statute that requires proof of "no reasonable prospect of reconciliation" and "serious marital discord adversely affecting the attitude of one or both of the parties" before a marriage can be dissolved does not allow "divorce on demand." Moreover, husband's withdrawal from the courtroom means he neither entered evidence contrary to wife's assertions on this point nor cross-examined her regarding the state of the marriage. Thus, the only evidence regarding the state of the parties' marriage was wife's uncontradicted testimony.

II.

Marriage, "so far as its validity in law is concerned," is a contract. Minn. Stat. § 517.01 (2000). That marriage is a contract for determining its validity does not mean marriage is a contract in the usual sense of that term. The basis for husband's argument that marriage is a contract is *Dartmouth*

College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).[1] There, the parties litigated whether a charter granted to certain college trustees was a contract and, if so, whether it could be altered by laws passed by the state legislature. 17 U.S. (4 Wheat.) 625-27. The Court held that the charter was a contract. 17 U.S. (4 Wheat.) at 627. It then addressed whether that contract was protected by the Contract Clause of the U.S. Constitution. In doing so, the breadth to be given the term "contract" was disputed. One of several arguments against a broad construction of "contract" was:

> That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude would prohibit these laws.

17 U.S. (4 Wheat.) at 627-28. The Court ruled that "the term 'contract' must be understood in a more limited sense." 17 U.S. (4 Wheat.) at 628. In addressing the argument regarding divorce, the Court noted;

> [The contract clause] never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. *When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.*

---

[1] Husband's argument focuses on the U.S. Constitution. Therefore, this opinion does as well.

17 U.S. (4 Wheat.) at 629 (emphasis added). The emphasized text is the crux of husband's argument. In a case involving whether a charter for a college is a contract protected by the U.S. Constitution, it is at best dictum. *See State ex rel. Foster v. Naftalin,* 246 Minn. 181, 208, 74 N.W.2d 249, 266 (1956) (stating dicta "generally is considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases."). Additionally, to read the dictum stating that "there will be time enough to inquire" whether a divorce statue is constitutional, as saying that such statutes *are un*constitutional is both to misread the dictum and to read the dictum as containing an advisory opinion. *See Princeton Univ. v. Schmid,* 455 U.S. 100, 102, 102 S. Ct. 867, 869 (1982) (stating courts do not sit "to give advisory opinions about issues as to which there are not adverse parties before [it]"). Thus, *Dartmouth* cannot be read to support the idea that marriage is a contract within the meaning of the U.S. Constitution.

Any doubt about the meaning of *Dartmouth* was eliminated in *Maynard v. Hill,* 125 U.S. 190, 8 S. Ct. 723 (1888). There, a husband moved away from his wife and to the Oregon Territory. Once there, he, without the knowledge or consent of his wife, procured a divorce. Later, he died. In the resulting litigation involving his estate, the validity of the divorce was questioned. The Supreme Court stated:

> The organic act [of the Territory] extends the legislative power of the territory to all rightful subjects of legislation "not inconsistent with the constitution and laws of the United States." The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of

> the supreme court of the territory, to legislation by territorial legislatures, *we are clear that marriage is not a contract within the meaning of the prohibition.* As was said by Chief Justice Marshall in the *Dartmouth College Case,* not by way of judgment but in answer to objections urged to positions taken: "The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."[2]

Maynard, 125 U.S. at 210, 8 S. Ct. at 729 (emphasis added).

Husband argues that *Maynard* is not binding because it misconstrues *Dartmouth* and was wrongly decided. Husband, however, cites no authority allowing this court to ignore, correct, or overrule the United States Supreme Court regarding the meaning of the United States Constitution.

Because husband incorrectly reads the Minnesota dissolution statute to allow "divorce on demand" and because he misreads the Supreme Court's statements on the subject of whether marriage is a contract, we need not address whether Minnesota's dissolution statutes must be construed in a manner different from the way they were applied here.[3]

---

[2] That *Maynard* refers to the relevant portion of *Dartmouth* as having been stated "not by way of judgment," shows that *Maynard* recognized *Dartmouth's* discussion of divorce was dictum.

[3] Even if marriage is a contract, appellant failed to introduce any evidence of the terms of his "contract." Therefore, the terms of his "contract" would be those provided by statute. And, the statute provides that a marriage can be dissolved if it is irretrievably broken. Thus, to prevail in this appeal, husband would have to show that the district court's finding of an irretrievable breakdown of the marriage is clearly erroneous. *See* Minn. R. Civ. P. 52.01 (stating findings of fact nor set aside unless clearly erroneous). When reviewing findings of fact, we view the record

III.

Husband challenges the denial of his request for a continuance. Whether to grant a continuance is discretionary with the district court. *Kate v. Kate*, 234 Minn. 402, 410, 48 N.W.2d 551, 557 (1951). The critical question in evaluating a continuance "is whether a denial prejudices the outcome of the trial." *Jones v. Jones*, 402 N.W.2d 146, 150 (Minn. App. 1987). In denying the continuance, the district court stated (a) the request was not timely; (b) husband had adequate time to hire counsel; (c) the April 26 order cancelled the hearing on husband's motion to dismiss, not the "trial"; (d) it was "very obvious" husband believed the dissolution hearing was set for May 8 because he sought a continuance; and (e) husband requested the continuance for delay. On this record, these findings are supported and husband has not shown that the district court abused its discretion in denying his request for a continuance. Indeed, that husband's request was made for the purpose of delay is a determination that husband did not act in good faith, and one to which we must defer. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (whether party acts in good faith is, essentially, credibility question); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (appellate courts defer to district court credibility determinations).

---

in the light most favorable to the district court's findings. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). Here, because husband withdrew from the courtroom, wife entered the only evidence on the state of the marriage. Viewing that evidence in the light most favorable to the district court's finding that the parties' marriage was irretrievably broken, the finding is not clearly erroneous.

DECISION

The Minnesota dissolution statues do not allow "divorce on demand," marriage is not a contract for purposes of the Contract Clauses of the United States and Minnesota Constitutions, and husband has not shown that the district court abused its discretion in denying his request for a continuance. Therefore, we affirm the district court.

Affirmed.

/s/Gordon Shumaker
4/20/01